10-18-2013

Huntsman v. State Respondent's Brief Dckt. 40549

IN THE SUPREME COURT OF THE STATE OF IDAHO

RONALD JOHN HUNTSMAN, SR.	)	
	)	No. 40549
Petitioner-Appellant,	)	
	)	Ada Co. Case No.
vs.	)	CV-2009-3325
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE TIMOTHY L. HANSEN
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

LORI A. FLEMING
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEYS FOR
RESPONDENT

GREG S. SILVEY
Silvey Law Office, Ltd.
PO Box 565
Star, Idaho 83669
(208) 286-7400

ATTORNEY FOR
PETITIONER-APPELLANT

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STATEMENT OF THE CASE

Nature of the Case

Ronald John Huntsman, Sr., appeals from the judgment entered upon the summary dismissal of his petition for post-conviction relief.

Statement of Facts and Course of Underlying Criminal Proceedings

In March 2005, Ronald Huntsman and Larry Hanslovan kidnapped Kyle Quinton and Becky Boden and took them to Barbara Dehl's house, where Hanslovan, Huntsman and Dehl bound them with packing tape, beat them and questioned them about rings Dehl claimed were missing from a safe at her residence. (Tr., Vol. I, p.1270, L.16 – p.1274, L.21, p.1279, L.12 – p.1288, L.15, p.1290, L.17 – p.1300, L.5; Tr., Vol. II, p.1495, L.15 – p.1496, L.12, p.1497, L.19 – p.1498, L.14, p.1503, L.3 – p.1519, L.15.[1]) During the questioning, someone implicated John Schmeichel in the theft of Dehl's rings. (Tr., Vol. I, p.1300, L.6 – p.1301, L.2, p.1432, Ls.2-18; Tr., Vol. II, p.1519, Ls.16-21.) Hanslovan and Huntsman released Kyle from his packing tape restraints and took him with them to find John Schmeichel. (Tr., Vol. I, p.1301, L.11 – p.1308, L.11; Tr., Vol. II, p.1519, L.22 – p.1520, L.22.)

[1] The state is, contemporaneously with the filing of this brief, filing a motion requesting the Idaho Supreme Court to take judicial notice of the clerk's record and transcripts filed in Huntsman's prior consolidated appeals, Docket Nos. 33213 and 33243. Unless otherwise specified, the transcripts cited herein are the transcripts that were prepared for and made part of the appellate record in Docket Nos. 33213 and 33243. The district court took judicial notice of those transcripts in the post-conviction proceedings that are the subject of this appeal. (See R., pp.588-90.)

When they arrived at the residence where John was staying, Hanslovan and Huntsman confronted John about the property that had allegedly been stolen from Dehl's safe. (Tr., Vol. I, p.1308, L.12 – p.1310, L.22, p.1745, L.199 – p.1750, L.11.) John left with Hanslovan, Huntsman and Kyle in Hanslovan's vehicle. (Tr., Vol. I, p.1311, Ls.1-16; Tr., Vol. II, p.1750, Ls.12-15.) While Hanslovan was driving the men back to Dehl's residence, Huntsman turned around from his position in the front passenger's seat and shot John in the face with a .38 caliber revolver, killing him. (Tr., Vol. I, p.1311, L.14 – p.1315, L.24, p.1319, L.16 – p.1320, L.25.) When they got back to Dehl's residence, Hanslovan and Huntsman enlisted Kyle's help in removing John's body from the vehicle and wrapping it in trash bags and a tarp. (Tr., Vol. I., p.1319, Ls.7-9, p.1321, Ls.9-10.) A day or two later, Huntsman and Hanslovan drove to Elmore County where they and two other individuals dug a shallow grave and buried John's body. (Tr., Vol. I, pp.902-1031; Tr., Vol. II, pp.1986, L.4 – p.1987, L.24, p.1991, L.3 – p.1993, L.18.)

A grand jury indicted Huntsman in Ada County case number H0500555 on one count of first degree murder, one count of using a firearm in the commission of the murder, and two counts of kidnapping. (#33213/33243 R., Vol. III, pp.403-05.) Hanslovan was charged, in the same indictment, with two counts of kidnapping, two firearm enhancements and one count of trafficking in methamphetamine. (#33213/33243 R., Vol. III, pp.403-05.) Dehl was charged with two counts of kidnapping and one count of trafficking in methamphetamine.

(#33213/33243 R., Vol. III, pp.403-05.) The district court denied the defendants' motions for separate trials, but ordered the drug trafficking charge to be severed and tried separately from the murder and kidnapping charges. (#33213/33243 R., Vol. III, pp.410-11, 418; 5/24/05 Tr., p.19, L.8 – p.21, L.6.) Huntsman and his co-defendants pled not guilty and the case was set for trial on October 11, 2005. (#33213/33243 R., Vol. III, p.440; 5/24/05 Tr., p.25, L.21 – p.26, L.16.)

At a hearing on September 30, 2005, Dehl and Hanslovan moved to continue the trial for the purpose of continuing their investigation. (Tr., Vol. I, p.66, L.4 – p.76, L.8, p.86, Ls.13-17.) The state joined in the motion, advising the court that it had just obtained new evidence. (Tr., Vol. I, p.77, L.1 – p.80, L.3.) Specifically, the state advised the court that, on September 29, 2005, one of its witnesses had turned over to police the frame and barrel of a .38 caliber revolver believed to be the murder weapon. (Tr., Vol. I, p.77, L.23 – p.79, L.23.) The state requested that the trial be continued to provide the parties the opportunity to investigate and test the newly discovered evidence. (Tr., Vol. I, p.77, Ls.1-13, p.79, L.23 – p.80, L.3.) Dehl and Hanslovan concurred with the state's request and waived their speedy trial rights. (Tr., Vol. I, p.84, L.1 – p.85, L.17.) Huntsman, however, objected to the continuance and declined to waive his speedy trial rights. (Tr., Vol. I, p.76, Ls.11-24, p.85, Ls.18-20.) The court granted the motion to continue as to Dehl and Hanslovan, but it denied the state's request to continue Huntsman's trial. (Tr., Vol. I, p.85, L.21 – p.86, L.2.) In doing so, the court rejected the state's assertion that the discovery of the new evidence constituted good cause to continue the trial notwithstanding

Huntsman's assertion of his statutory speedy trial rights. (Tr., Vol. I, p.80, L.4 – p.81, L.6.) The court noted, however, that the state did have another course of action available to it, that being to "simply dismiss [the charges against Huntsman] and then move to consolidate on a refile[d] charge." (Tr., Vol. I, p.81, L.21 – p.82, L.2.)

On October 6, 2005, the state filed a motion to dismiss the charges against Huntsman without prejudice. (#33213/33243 R., Vol. III, pp.487-88.) The district court entered an order granting the motion on October 7, 2005. (#33213/33243 R., Vol. III, p.492.)

On October 11, 2005, a grand jury indicted Huntsman in Ada County case number H0501438 on one count of first degree murder, one count of using a firearm in the commission of the murder, and two counts of kidnapping. (#33213/33243 R., Vol. I, pp.9-11.) Over Huntsman's objection, the district court granted the state's motion to consolidate Huntsman's case, number H0501438, with Dehl's and Hanslovan's case, number H0500555, for trial. (#33213/33243 R., Vol. I, pp.17-18, 21-22; Tr., Vol. I, p.106, L.7 – p.120, L.3.) The court set the trial for April 10, 2006. (Tr., Vol. I, p.126, Ls.14-15, p.127, L.9 – p.128, L.2.)

Prior to trial, the charges against Dehl and Hanslovan in Ada County case number H0500555 were resolved by way of plea negotiations with the state. (#33213/33243 R., Vol. I, p.72; Tr., Vol. I, p.199, Ls.4-13.) The state proceeded to trial against Huntsman in case number H0501438, after which a jury found Huntsman guilty as charged. (#33213/33243 R., Vol. II, pp.356-58.) On June 28, 2006, the district court entered judgment on the jury's verdicts and imposed a

unified life sentence with 30 years fixed upon Huntsman's convictions for first-degree murder and the firearm enhancement, and concurrent unified sentences of 20 years with 10 years fixed upon his convictions for kidnapping. (#33213/33243 R., Vol. II, pp.381-85.) Huntsman filed a notice of appeal, bearing both case numbers H050555 and H0501438, on July 5, 2006. (#33213/33243 R., Vol. II, pp.386-90; #33213/33243 R., Vol. III, pp.523-26.)

Course Of Appellate Proceedings (Consolidated Docket Nos. 33213 and 33243)

On appeal, Huntsman attempted to challenge the order of dismissal entered in case number H050555, claiming the district court erred as a matter of law in granting the motion to dismiss, "the dismissal without prejudice resulted in a violation of his due process rights," and "the district court judge showed partiality by suggesting to the prosecution that it could simply dismiss and re-file the charges against [him]." State v. Huntsman, 146 Idaho 580, 583, 199 P.3d 155, 158 (Ct. App. 2008) (review denied Jan. 6, 2009). (See also #33213/33243 Appellant's brief, pp.7-14, 28-40.) The Idaho Court of Appeals held it was without jurisdiction to consider any of Huntsman's claims arising out of the dismissal of case number H0500555, and therefore declined to address them, because Huntsman failed to file a notice of appeal within 42 days of the dismissal order. Huntsman, 146 Idaho at 583-84, 199 P.3d at 158-59.

Regarding case number H0501438, Huntsman argued, *inter alia*, that the prosecution of him in that case violated his state and federal constitutional rights to a speedy trial. Id. at 584-86, 199 P.3d at 159-61. (See also #33213/33243 Appellant's brief, pp.14-28.) The Idaho Court of Appeals declined to consider

the merits of Huntsman's speedy trial claim, concluding Huntsman had failed to preserve the issue for appeal. Huntsman, 146 Idaho at 584-86, 199 P.3d at 159-61. Specifically, the Court found that, while Huntsman had filed a motion to dismiss case number H0501438 based on an alleged speedy trial violation, Huntsman's attorney never pursued the motion and, as such, it "was never argued to or decided by the [trial] court." Id. at 585, 199 P.3d at 160 (footnote omitted). There being no adverse ruling to form a basis for Huntsman's assignment of error, the Court held the issue was not preserved. Id. at 585-86, 199 P.3d at 160-61.

Huntsman also argued in connection with case number H0501438 that the district court erred by allowing two late disclosed witnesses to testify at trial, failing to strike the testimony of two witnesses Huntsman asserted violated the court's I.R.E. 615 exclusion orders, and denying his motion for a mistrial made after a state's witness made the jury aware that Huntsman was being represented by a public defender. Id. at 586-91, 199 P.3d at 161-66. (See also #33213/33243 Appellant's brief, pp.40-64.) The Court of Appeals addressed the merits of each of these issues and, ultimately, affirmed Huntsman's convictions. Huntsman, 146 Idaho at 586-91, 199 P.3d at 161-66. The Idaho Supreme Court denied Huntsman's petition for review on January 6, 2009. (#33213/33243 file folder.) A remittitur issued on January 9, 2009. (Id.)

Course of Post-Conviction Proceedings (Docket No. 40549)

On February 20, 2009, Huntsman filed a *pro se* petition for post-conviction relief, a supporting affidavit and exhibits, and a motion for the appointment of counsel. (R., pp.9-97.) The district court granted the motion for appointment of counsel (R., pp.102-03) and, subsequently, entered an order permitting Huntsman to file an amended post-conviction petition (R., pp.128-29, 144-45).

Huntsman filed an amended petition and supporting materials on September 30, 2009. (R., pp.156-278.) Relevant to this appeal, the amended petition alleged trial counsel was ineffective for failing to file a timely appeal from the order of dismissal in case number H0500555 and for failing to pursue the speedy trial issue in case number H0501438. (R., pp.159-61.) The amended petition also alleged numerous other claims of ineffective assistance of counsel in the trial and sentencing phases of case number H0501438, as well as a claim of newly discovered evidence. (R., pp.161-69.)

The state answered the amended petition and moved to dismiss it. (R., pp.281-304, 435-47.) The state also filed a motion requesting the district court to take judicial notice of, *inter alia*, the clerk's records and transcripts in the underlying criminal proceedings. (R., pp.584-87.) The district court granted the motion for judicial notice (R., pp.588-90) and, after a hearing, entered a memorandum decision and order granting in part and denying in part the state's motion for summary dismissal (R., pp.591-616). Specifically, the court granted the state's motion for summary dismissal as to all of the ineffective assistance of counsel claims arising out of case number H0501438 – including the claim that

trial counsel was ineffective for failing to pursue the speedy trial issue – but denied the motion as to Huntsman's newly discovered evidence claim and his claim that trial counsel was ineffective for failing to file a timely appeal from the order of dismissal in case number H0500555. (Id.)

Following an evidentiary hearing on the two remaining claims in the amended petition, the district court dismissed Huntsman's newly discovered evidence claim on the basis that Huntsman failed to prove the claim by a preponderance of the evidence. (#40549 Tr., p.206, L.24 – p.208, L.12; R., pp.704-08.) The court raised on its own motion the question of whether it even had jurisdiction to entertain Huntsman's claim that trial counsel was ineffective for failing to file an appeal from the order of dismissal in case number H0500555. (#40549 Tr., p.203, L.4 – p.204, L.16, p.208, L.13 – p.209, L.10, p.212, Ls.8-13, p.214, L.20 – p.219, L.6.) The court explained:

> In looking at the Postconviction Procedure Act, and specifically that is Idaho Code [§] 19-4601 et seq., -- correction, 4901 et seq., in that case the language there as to the type of actions that may be brought pursuant to the Postconviction Procedure Act are for convictions.
>
> Everything that I have read in the statute itself, everything that I have researched in the case authority indicates that the Postconviction Procedure Act and the ability of the Court to grant postconviction relief pursuant to its terms concerns convictions that have entered and not dismissals.

(#40549 Tr., p.218, Ls.1-13.) The court gave the parties notice of its intent to summarily dismiss the "application for postconviction relief at least as it relate[d] to the failure to appeal the 555-case" on the basis that it lacked jurisdiction to entertain that claim. (#40549 Tr., p.218, L.24 – p.219, L.18.)

After the court gave notice of its intent to summarily dismiss the ineffective assistance of counsel claim arising out of case number H0500555, the state moved to amend its answer to assert as an affirmative defense that the petition was not timely from the dismissal of case number H0500555. (#40549 Tr., p.222, L.12 – p.223, L.6.) The court deferred ruling on the requested amendment and permitted the parties to brief both the issues of the court's jurisdiction and the timeliness of the petition as it related to case number H0500555. (#40549 Tr., p.219, L.7 – p.221, L.18, p.223, L.16 – p.224, L.23.)

Following briefing and another hearing (see generally R., pp.709-22; #40549 Tr., pp.229-42), the district court entered a memorandum decision and order summarily dismissing Huntsman's claim that trial counsel was ineffective for not timely appealing the order of dismissal in case number H0500555 (R., pp.724-30). The court ruled it lacked jurisdiction under the UPCPA to entertain the claim because it arose from the dismissal of a criminal action, not from a conviction. (R., pp.727-28.) Alternatively, the court ruled the claim – which was filed more than three years after entry of the order dismissing case number H0500555 – was untimely. (R., pp.726-27.) The district court entered a final judgment of dismissal (R., pp.731-32), from which Huntsman timely appealed (R., pp.733-36).

ISSUES

Huntsman states the issues on appeal as:

> I.
>
> Whether the district court erred when it denied post-conviction relief on the failure to appeal issue because it erroneously ruled that it had no jurisdiction to grant the requested relief.
>
> II.
>
> Whether the district court erred when it summarily dismissed the claim that counsel failed to preserve the speedy trial issue because it erroneously ruled that there was not a reasonable probability that said claim would have been meritorious.

(Appellant's brief, p.7.)

The state rephrases the issues as:

1. Has Huntsman failed to show error in the summary dismissal of his claim that trial counsel was ineffective for not filing a timely notice of appeal from the order of dismissal in case number H0500555 because the claim was itself jurisdictionally barred or, alternatively, not timely raised in the UPCPA proceeding?

2. Has Huntsman failed to show error in the district court's finding that he failed to establish a material issue of fact entitling him to an evidentiary hearing on his claim that trial counsel was ineffective for not pursuing the speedy trial issue in case number H0501438?

ARGUMENT

I.
Huntsman Has Failed To Show Error In The Summary Dismissal Of His Claim That Trial Counsel Was Ineffective For Not Filing A Timely Notice Of Appeal From The Order Of Dismissal In Case Number H0500555

A. Introduction

Huntsman's amended post-conviction petition alleged trial counsel was ineffective for failing to file a timely appeal from the district court's order of dismissal in case number H0500555. (R., pp.159-61.) The district court summarily dismissed this claim on two alternative bases. First, the court held it was without jurisdiction to entertain the claim because the remedies afforded by the UPCPA are available only to persons who have been convicted of or sentenced for a crime, not to persons whose criminal cases have been dismissed. (R., pp.727-28.) Alternatively, the court held the claim was time-barred because it was filed more than three years after the entry of the dismissal order in case number H0500555. (R., pp.726-27.) Contrary to Huntsman's assertions on appeal, correct application of the law to the facts of this case supports the district court's rulings.

B. Standard Of Review

On appeal from summary dismissal of a post-conviction petition, the appellate court reviews the record to determine if a genuine issue of material fact exists, which, if resolved in the applicant's favor, would entitle the applicant to the requested relief. Matthews v. State, 122 Idaho 801, 807, 839 P.2d 1215, 1221 (1992); Aeschliman v. State, 132 Idaho 397, 403, 973 P.2d 749, 755 (Ct. App.

1999). Appellate courts freely review whether a genuine issue of material fact exists. Edwards v. Conchemco, Inc., 111 Idaho 851, 852, 727 P.2d 1279, 1280 (Ct. App. 1986).

Whether a court has jurisdiction is a question of law, given free review. State v. Kavajecz, 139 Idaho 482, 483, 80 P.3d 1083, 1084 (2003). The interpretation and construction of a statute also present questions of law over which the appellate court exercises free review. State v. Thompson, 140 Idaho 796, 798, 102 P.3d 1115, 1117 (2004).

C. The District Court Correctly Held It Was Without Jurisdiction To Entertain Huntsman's Claim That Trial Counsel Was Ineffective For Failing To Timely Appeal The Order Of Dismissal In Case Number H0500555

Huntsman alleged in his amended post-conviction petition that trial counsel was ineffective for failing to timely file a notice of appeal from the order of dismissal in case number H0500555. (R., pp.159-60.) As a remedy for the alleged violation, Huntsman asked the district court to reenter the dismissal order and reinstate his right to appeal. (R., p.160; #40549 Tr., p.203, L.4 – p.204, L.13.) The district court ruled it was without jurisdiction to grant the requested relief because its jurisdiction over the criminal case expired 42 days after entry of the dismissal order, and the provisions of the UPCPA – which by its plain terms affords relief from convictions and sentences, not dismissals – did not extend that jurisdiction. (R., pp.727-28.) The district court was correct.

It is well settled that a "trial court's jurisdiction to amend or set aside a judgment expires once the judgment becomes final, either by expiration of the time for appeal or affirmance of the judgment on appeal." State v. Jakoski, 139

Idaho 352, 354, 79 P.3d 711, 713 (2003), quoted in State v. Johnson, 152 Idaho 41, 47, 266 P.3d 1146, 1152 (2011). Where, as in case number H0500555, a trial court enters an order dismissing the criminal case, the dismissal "is tantamount to a judgment and is final 42 days later, when the time for appeal runs." Johnson, 152 Idaho at 47, 266 P.3d at 1152 (citing I.A.R. 11(c)(4), 14(a)). "Jurisdiction of a criminal matter thus expires 42 days after the district court dismisses the case unless an appeal or some statute or rule extends that jurisdiction." Id.

In this case, Huntsman attempted to invoke the provisions of the UPCPA, I.C. § 19-4901, *et seq.*, as the basis for extending the court's jurisdiction to reenter the order of dismissal in case number H0500555. As found by the district court, however, the plain language of I.C. § 19-4901(a) provides that the remedies afforded under the UPCPA are available only to persons who have "been convicted of, or sentenced for, a crime." Other provisions of the UPCPA similarly make clear that a court's authority to grant post-conviction relief from an otherwise final criminal proceeding is limited to criminal cases in which there was a conviction or sentence. See I.C. §§ 19-4902 (post-conviction "proceeding is commenced by filing an application verified by the applicant with the clear of the district court in which the conviction took place"), 19-4903 (post-conviction application must "identify the proceedings in which the applicant was convicted" and "give the date of the entry of the judgment and sentence complained of"), 19-4907(a) ("If the court finds in favor of the applicant, it shall enter an appropriate order with respect to the conviction or sentence in the former

proceedings ...."). Nowhere in the statutory scheme is there any indication that a court has jurisdiction to grant relief in a criminal case in which the charges have been finally dismissed.

It is axiomatic and long-established that a statute will be interpreted according to its plain language and that where the language is plain the court will not resort to principles of statutory construction. State v. Schwartz, 139 Idaho 360, 362, 79 P.3d 719, 721 (2003); State v. McCoy, 128 Idaho 362, 365, 913 P.2d 578, 581 (1996); see also Verska v. St. Alphonsus Regional Medical Center, 151 Idaho 889, 895-96, 265 P.3d 502, 508-09 (2011) (if the plain language of a statute is capable of only one reasonable interpretation, it is the Court's duty to give the statute that interpretation). Because the provisions of the UPCPA unambiguously limit a court's authority to grant post-conviction relief from a conviction or sentence, the district court correctly determined it was without jurisdiction to grant Huntsman relief from the order of dismissal in case number H0500555. (See R., p.728.)

Huntsman argues on appeal that, by dismissing the ineffective assistance of counsel claim arising out of case number H0500555 for lack of jurisdiction, the "district court misunderstood the nature of the claim, the [UPCPA], and its full authority." (Appellant's brief, p.16.) Although recognizing the relief he sought was the reentry of the order of dismissal and reinstatement of his appellate rights in case number H0500555, Huntsman nevertheless maintains that his "challenge is to a conviction, not a dismissal." (Id.) Specifically, Huntsman contends he "is not abstractly challenging his counsel's failure to file a notice of appeal in the

original case" or even "complaining his rights were violated in a case which was dismissed and never re-filed," but is instead "asserting that his conviction and imprisonment for the crimes of murder and kidnapping are in violation of the Constitution because he received ineffective assistance from the counsel who represented him in the trial court on those charges." (Id., pp.16-17.) The fatal flaw in Huntsman's argument is that it fails to recognize that the case in which he was convicted – case number H0501438 – was an entirely separate criminal proceeding than case number H0500555. See State v. Huntsman, 146 Idaho 580, 583-84, 199 P.3d 155, 158-59 (Ct. App. 2008) (rejecting Huntsman's assertion that re-filing of identical charges in case number H0501438 had effect of "resurrecting" case number H0500555 and making it "part of the second [case]" (brackets original)). While the court clearly had jurisdiction under the UPCPA to entertain the ineffective assistance of counsel claims arising directly out of counsel's representation of Huntsman in the case in which he was actually convicted, the court correctly concluded that nothing in the UPCPA conferred upon it authority to grant Huntsman's request for relief in an entirely separate case in which the charges against Huntsman had been dismissed.

Huntsman correctly points out that, under the UPCPA and established case law, the remedy for trial counsel's failure to file a notice of appeal from a judgment of conviction is reentry of the judgment and reinstatement of the right to appeal. (Appellant's brief, pp.18-20 (citing Flores v. State, 104 Idaho 191, 195, 657 P.2d 488, 492 (Ct. App. 1993); State v. Dillard, 110 Idaho 834, 837-38, 718 P.2d 1272, 1275-76 (Ct. App. 1986).) Huntsman argues that, "[b]y the same

logic, the remedy for failure to file an appeal from a dismissal should be re-entry of the order of dismissal." (Appellant's brief, p.18.) To support this claim, Huntsman relies on the Idaho Supreme Court's statement in State v. Johnson, 152 Idaho 41, 266 P.3d 1146 (2011), that "[a] district court's dismissal of a criminal case is tantamount to a judgment and is final 42 days later, when the time for appeal runs." That an order of dismissal is "tantamount to a judgment" for purposes of determining the finality of the criminal action does not compel the conclusion, suggested by Huntsman, that such dismissal order is subject to collateral attack under the provisions of the UPCPA. Again, the UPCPA very clearly provides that post-conviction remedies are available only to persons who have been "convicted of, or sentenced for, a crime." I.C. § 19-4901(a). A judgment of dismissal, while clearly a final appealable order, is the antithesis of a criminal conviction or sentence and, as such, does not fall within the types of orders from which the court can grant relief under the UPCPA.

Citing I.C. § 19-4907(a), Huntsman next argues the district court had authority "to enter whatever order" it deemed "necessary and proper" to remedy any prejudiced Huntsman suffered as a result of counsel's failure to file a timely notice of appeal case number H0500555, regardless of the fact that the case was dismissed. (Appellant's brief, pp.19-21.) Huntsman's argument is without merit. Idaho Code § 19-4907(a) specifically states that, "[i]f the court finds in favor of the applicant, it shall enter an appropriate order *with respect to the conviction or sentence in the former proceedings*, and any supplementary orders as to rearraignment, retrial, custody, bail, discharge, correction of sentence, or

other matters that may be necessary and proper." (Emphasis added). Pursuant to the plain language of this statute, the court's ability to enter necessary and proper orders as to matters other than conviction and sentence is specifically contingent on there actually being a conviction or sentence in the former proceeding from which the relief is being sought. Such is not surprising since, under I.C. § 19-4901(a), only those persons who have been "convicted of, or sentenced for, a crime" are entitled to relief under the UPCPA.

In a final argument, Huntsman appears to contend that, regardless of whether he was convicted in case number H0500555, the district court had authority under "the constitutional ... and/or common law remedy of habeas corpus" to grant the requested relief because "[t]he writ of habeas corpus has always been able to remedy illegal custody." (Appellant's brief, pp.21-23.) Huntsman's argument fails for at least two reasons.

First, as Huntsman acknowledges, the common law remedy of habeas corpus has been subsumed by the UPCPA. (See Appellant's brief, pp.21-22 (citing Dionne v. State, 93 Idaho 235, 459 P.2d 1017 (1969)). Because, as repeatedly stated above, the remedies under the UPCPA are available only to persons who have been "convicted of, or sentenced for, a crime," I.C. § 19-4901(a), the district court did not have jurisdiction in the post-conviction case to grant Huntsman's request for relief from the order of dismissal in case number H0500555. To the extent Huntsman now claims there is some free-standing right to habeas relief that is broader in scope than the relief afforded by the UPCPA, Huntsman has failed to cite any authority to support such a claim and

has therefore waived consideration of it on appeal. State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996).

Second, even assuming the trial court had authority under the writ of habeas corpus to "remedy illegal custody," it could not do so in relation to case number H0500555 because Huntsman is not in custody on that case. Rather, Huntsman's custodial status is a direct result of his conviction in case number H0501438.

The district court correctly concluded it was without jurisdiction under the UPCPA to grant relief on Huntsman's claim that trial counsel was ineffective for failing to file a timely notice of appeal from the order of dismissal in case number H0500555. Having failed either below or on appeal to identify any statute or rule that would extend the court's jurisdiction to order the requested relief, Huntsman has failed to show any basis for reversal of the court's order summarily dismissing the claim for lack of jurisdiction.

D. Alternatively, The District Court Correctly Dismissed The Ineffective Assistance Of Counsel Claim Arising Out Of Case Number H0500555 Because Huntsman Failed To File The Claim Within The Time Limits Prescribed By The UPCPA

Idaho Code § 19-4902(a) requires that a post-conviction proceeding be commenced by filing a petition "any time within one (1) year from the expiration of the time for appeal or from the determination of an appeal or from the determination of proceedings following an appeal, whichever is later." Absent a showing by the petitioner that the one-year statute of limitation should be tolled, the failure to file a timely petition for post-conviction relief is a basis for dismissal

of the petition. Evensiosky v. State, 136 Idaho 189, 30 P.3d 967 (2001); Sayas v. State, 139 Idaho 957, 959, 88 P.3d 776, 778 (Ct. App. 2003).

The district court entered its order dismissing the prosecution against Huntsman in case number H0500555 on October 7, 2005. (#33213/33243 R., Vol. III, p.492.) Huntsman did not file a timely notice of appeal from the order of dismissal and, as such, the dismissal became final 42 days later, on November 18, 2005. See State v. Johnson, 152 Idaho 41, 47, 266 P.3d 1146, 1152 (2011) ("A district court's dismissal of a criminal case is tantamount to a judgment and is final 42 days later, when the time for appeal runs."). Huntsman's untimely notice of appeal, filed on July 5, 2006, did not extend the limitation period of I.C. § 19-4902(a) for filing any claims for post-conviction relief arising out of case number H0500555. See Schultz v. State, 151 Idaho 383, 385, 256 P.3d 791, 793 (Ct. App. 2011) ("An untimely notice of appeal in the criminal case cannot postpone the commencement of the limitation period because a time-barred notice of appeal does not confer jurisdiction on the appellate courts and, thus, there is no valid appeal for an appellate court to 'determine' that could extend the post-conviction statute of limitation under I.C. § 19-4902(a)."). Therefore, to be timely as to any issues arising out of case number H0500555, Huntsman's post-conviction petition must have been filed on or before November 18, 2006 – one year from the expiration of Huntsman's time to appeal the order dismissing case number H0500555 without prejudice. I.C. § 19-4902(a). Huntsman did not file his post-conviction petition until February 20, 2009 (R., p.9), more than three

years after the order of dismissal in case number H0500555 became final, and more than two years after the limitation period of I.C. § 19-4902(a) had expired.

Because Huntsman did not file his post-conviction petition within one year of the final determination of case number H0500555, the claim in the petition that trial counsel was ineffective for not filing a timely notice of appeal from the order of dismissal in case number H0500555 was untimely on its face and was subject to summary dismissal unless Huntsman alleged facts sufficient to establish a *prima facie* case for equitable tolling. On appeal, Huntsman appears to argue that the limitation period should have been tolled because, he contends, "the claim of ineffective assistance of counsel for failing to appeal was not ripe until the Court of Appeals held that the appellate issues from the original case were not preserved, which occurred more than one year and 42 days after the order of dismissal." (Appellant's brief, p.23.) Huntsman did not allege this "ripeness" claim as a basis for equitable tolling in either his amended post-conviction petition or in response to the district court's notice of intent to dismiss (see R., pp.159-60, 720) and, as such, it is not properly before this Court. E.g., Small v. State, 132 Idaho 327, 331, 971 P.2d 1151, 1155 (Ct. App. 1998) (declining to consider for first time on appeal claims not raised in post-conviction petition). Even if he had, the claim would not have been sufficient to make out a *prima facie* case for equitable tolling.

As far as the state can discern, Huntsman's argument that the ineffective assistance of counsel claim arising out of case number H0500555 was not "ripe" until the Court of Appeals issued its opinion in State v. Huntsman, 146 Idaho

580, 199 P.3d 155 (Ct. App. 2008), is really an argument that Huntsman could not have known trial counsel was ineffective for failing to file a timely notice of appeal until the Court of Appeals announced in its opinion that it would not consider any issues arising out of case number H0500555 because Huntsman failed to file a timely notice of appeal in that case. (See Appellant's brief, pp.23-24.) In addition to being hopelessly circular, this argument is both legally and factually incorrect and fails to establish any basis for equitable tolling.

Idaho recognizes equitable tolling in limited circumstances, including where there are "'claims which simply [were] not known to the defendant within the time limit, yet raise important due process issues.'" Rhoades v. State, 148 Idaho 247, 250, 220 P.3d 1066, 1069 (2009) (quoting Charboneau v. State, 144 Idaho 900, 904, 174 P.3d 870, 874 (2007)). The time for raising claims involving important due process issues may be tolled until the discovery of the violation. Id. at 251, 220 P.3d at 1070 (citing Charboneau, 144 Idaho at 904, 174 P.3d at 874). Even claims raising important due process issues are deemed waived, however, if not brought within a reasonable time of when the claims were known or should have been known. Id. Regarding ineffective assistance of counsel claims, the Idaho Supreme Court has "repeatedly held" that such "claims can or should be known after trial." Id. at 253, 220 P.3d at 1072. Accordingly, the one-year statute of limitation for bringing ineffective assistance of counsel claims generally starts running immediately from the date the judgment – or, in this case, order of dismissal - becomes final. Id., 148 Idaho at 253, 220 P.3d at 1072.

Applying these well-settled legal principles to the facts of this case shows Huntsman has failed to show any basis for equitable tolling. When the district court entered the order of dismissal in case number H0500555, Idaho law very clearly provided that, to be timely, any notice of appeal from the order of dismissal must have been filed within 42 days. See I.A.R. 11(c)(3) (order granting motion to dismiss an information is appealable as a matter of right); I.A.R. 11(c)(4) (any order terminating criminal action is appealable as a matter of right); I.A.R. 14 (appeal as a matter of right from judgment or final order in a criminal action must be filed within 42 days). Idaho law also very clearly provided that a timely notice of appeal is a prerequisite to appellate jurisdiction. See I.A.R. 21; State v. Payan, 128 Idaho 866, 867, 920 P.2d 82, 83 (Ct. App. 1996). Huntsman's claim became "ripe" when his counsel did not file an appeal within 42 days of the order of dismissal, not when the Court of Appeals concluded it did not have appellate jurisdiction over that order. The factual basis of Huntsman's ineffective assistance of counsel claim – that trial counsel did not file an appeal within 42 days of the October 7, 2005 order of dismissal in case number H0500555 – was or reasonably should have been known to Huntsman no later than November 2005. Bringing the claim in February 2009, when the facts underlying the claim were known to Huntsman in November 2005, is simply not reasonable under the applicable law. See Rhoades, 148 Idaho at 253, 220 P.3d at 1072 ("The facts of the case, being particularly within the knowledge of the defendant should be sufficient to alert a defendant to the presence of ineffective assistance of counsel.").

Because Huntsman failed to bring his ineffective assistance of counsel claim arising out of case number H0500555 within the one-year limitation period of I.C. § 19-4902, and because he failed to allege any facts to establish a basis for equitable tolling, he has failed to show any basis for reversal of the district court's order summarily dismissing that claim as untimely.

II.
Huntsman Has Failed To Show Error In The Summary Dismissal Of His Claim That Trial Counsel Was Ineffective For Not Pursuing The Motion To Dismiss The Indictment In Case Number H0501438 For An Alleged Speedy Trial Violation

A. Introduction

Huntsman alleged in his amended post-conviction petition that trial counsel was ineffective for not pursuing a motion to dismiss the indictment in case number H0501438 for an alleged speedy trial violation, thereby failing to preserve the speedy trial issue for appeal. (R., pp.160-61.) The district court summarily dismissed this claim, concluding Huntsman failed to demonstrate a reasonable probability that such motion would have been meritorious and, therefore, failed to "raise[] an issue of fact as to whether [trial counsel's] failure to fully prosecute the motion to dismiss constituted deficient performance." (R., pp.598-600.) Contrary to Huntsman's arguments on appeal, a review of the record and the applicable law supports the district court's ruling.

B. Standard Of Review

On appeal from summary dismissal of a post-conviction petition, the appellate court reviews the record to determine if a genuine issue of material fact exists, which, if resolved in the applicant's favor, would entitle the applicant to the requested relief. Matthews v. State, 122 Idaho 801, 807, 839 P.2d 1215, 1221 (1992); Aeschliman v. State, 132 Idaho 397, 403, 973 P.2d 749, 755 (Ct. App. 1999). Appellate courts freely review whether a genuine issue of material fact exists. Edwards v. Conchemco, Inc., 111 Idaho 851, 852, 727 P.2d 1279, 1280 (Ct. App. 1986).

C. Huntsman Failed To Make A *Prima Facie* Showing That, If Pursued, The Motion To Dismiss Case Number H0501438 Based On An Alleged Speedy Trial Violation Would Have Been Granted

"To withstand summary dismissal, a post-conviction applicant must present evidence establishing a prima facie case as to each element of the claims upon which the applicant bears the burden of proof." State v. Lovelace, 140 Idaho 53, 72, 90 P.3d 278, 297 (2003) (citing Pratt v. State, 134 Idaho 581, 583, 6 P.3d 831, 833 (2000)). Thus, a claim for post-conviction relief is subject to summary dismissal "if the applicant's evidence raises no genuine issue of material fact" as to each element of the petitioner's claims. Workman v. State, 144 Idaho 518, 522, 164 P.3d 798, 802 (2007) (citing I.C. § 19-4906(b), (c)); Lovelace, 140 Idaho at 72, 90 P.3d at 297. "Allegations contained in the application are insufficient for the granting of relief when (1) they are clearly disproved by the record of the original proceedings, or (2) do not justify relief as a matter of law." Workman, 144 Idaho at 522, 164 P.3d at 802.

In order to establish a *prima facie* claim of ineffective assistance of counsel, a post-conviction petitioner must demonstrate both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); State v. Charboneau, 116 Idaho 129, 137, 774 P.2d 299, 307 (1989). When a post-conviction petitioner claims his counsel was ineffective for failing to file a motion, "the district court may consider the probability of success of the motion in question in determining whether the attorney's inactivity constituted incompetent performance." Wolf v. State, 152 Idaho 64, 67, 266 P.3d 1169, 1172 (Ct. App. 2011) (citing Boman v. State, 129 Idaho 520, 526, 927 P.2d 910, 916 (Ct. App.1996)). "Where the alleged deficiency is counsel's failure to file a motion, a conclusion that the motion, if pursued, would not have been granted by the trial court, is generally determinative of both prongs of the *Strickland* test." Id. at 67-68, 266 P.3d at 1172-73.

Huntsman's trial counsel filed a motion to dismiss case number H0501438, asserting in conclusory fashion that the state, by dismissing and re-filing the charges against Huntsman, "intentionally violated his Constitutional and statutory rights to a speedy trial." (#33213/33243 R., Vol. I, pp.32-33.) Trial counsel never sought or obtained a ruling on the motion, however, and, as a result, forfeited consideration of the issue on Huntsman's direct appeal. See Huntsman, 146 Idaho 580, 584-86, 199 P.3d at 159-61 (declining to address merits of Huntsman's claim of a constitutional speedy trial violation, finding issue not preserved due to failure of counsel to obtain a ruling on motion to dismiss). As he did below, Huntsman now claims there is a reasonable probability that,

had the constitutional speedy trial arguments been pursued, they "would have been meritorious at the trial or appellate level, and thus counsel's failure to preserve the speedy trial issue was cognizable ineffective assistance of counsel."[2] (Appellant's brief, pp.27-28.) Review of the record and the applicable law shows Huntsman is incorrect.

"Both the Sixth Amendment to the United States Constitution and Article 1, § 13 of the Idaho Constitution guarantee to criminal defendants the right to a speedy trial." State v. Lopez, 144 Idaho 349, 352, 160 P.3d 1284, 1287 (Ct. App. 2007). When analyzing claims of speedy trial violations under the state and federal constitutions, the Idaho appellate courts utilize the four-part balancing test set forth by the United States Supreme Court in Barker v. Wingo, 407 U.S. 514 (1972). State v. Young, 136 Idaho 113, 117, 29 P.3d 949, 953 (2001); Lopez, 144 Idaho at 352, 160 P.3d at 1288; State v. Avila, 143 Idaho 849, 853, 153 P.3d 1195, 1199 (Ct. App. 2006). The factors to be considered are: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of

[2] Citing his Appellant's brief in consolidated Docket Nos. 33213 and 33214, Huntsman contends he also argued to the district court in the post-conviction proceeding that the dismissal and re-filing of the charges against him violated his due process rights and that the district court failed to address those claims. (Appellant's brief, pp.26-27.) The state agrees these arguments were contained in Huntsman's original appellate briefing, which was attached as an exhibit to Huntsman's brief in opposition to the state's motion for summary dismissal. (See R., pp.496-508.) Contrary to Huntsman's assertions, however, the due process issues were raised in the amended post-conviction petition and supporting materials as part and parcel of Huntsman's claim that trial counsel was ineffective for not filing a timely notice of appeal in case number H0500555. (See R., pp.159-60, 451-53.) Huntsman did not allege or argue any due process violations in connection with his claim that trial counsel was ineffective for failing to pursue the speedy trial issue in case number H0501438. (See R., pp.160-61, 455-56.)

his or her right to a speedy trial; and (4) the prejudice occasioned by the delay. Barker, 407 U.S. at 530. Although Huntsman argues otherwise, balancing of these factors in this case supports the district court's determination that Huntsman would not have prevailed on his claim of a constitutional speedy trial violation, either in the trial court or on appeal.

1. The Length Of The Delay, While Sufficient To Trigger Balancing, Does Not Weigh In Huntsman's Favor

"The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." Barker, 407 U.S. at 530. For purposes of the Sixth Amendment, "the period of delay is measured from the date there is 'a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge.'" Lopez, 144 Idaho at 352, 160 P.3d at 1287 (citing United States v. Marion, 404 U.S. 307, 320 (1971); Young, 136 Idaho at 117, 29 P.3d at 953.) "Similarly, under the Idaho Constitution, the period of delay is measured from the date formal charges are filed or the defendant is arrested, whichever occurs first." Lopez, 144 Idaho at 352, 160 P.3d at 1287 (citations omitted). Once the balancing test is triggered, the length of delay also becomes a factor in and of itself. Avila, 143 Idaho at 853, 153 P.3d at 1199.

It is undisputed that Huntsman was arrested on March 24, 2005, and the state brought him to trial on April 10, 2006. (See R., p.599; Appellant's brief, p.30.) Subtracting the four-day period between the dismissal of the charges in case number H0500555 on October 7, 2005, and the re-filing of charges in case

number H0501438 on October 11, 2005, the state agrees with Huntsman that the total period of delay in bringing him to trial was approximately 12 ½ months. See State v. Davis, 141 Idaho 828, 842, 118 P.3d 160, 174 (Ct. App. 2005) (citing United States v. McDonald, 456 U.S. 1, 8 (1982)) ("The constitutional speedy trial guarantee does not protect any delay in refilling criminal charges after charges have been dismissed.").

The state concedes that the delay of just over 12 months is sufficient to trigger the Barker balancing test – but not by much. See State v. Campbell, 104 Idaho 705, 708, 662 P.2d 1149, 1152 (Ct. App. 1983) (citing State v. Talmage, 104 Idaho 249, 252, 658 P.2d 920, 923 (1983)) ("A delay of [approximately 12 months] is sufficient to trigger an inquiry into whether speedy trial has been denied."). As noted in Barker, the reasonableness of length of the delay must be evaluated in light of the nature of the offense for which the defendant is standing trial: "[T]he delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." Barker, 407 U.S. 531. Considering the nature of the charges on which Huntsman was standing trial – first degree murder, a firearm enhancement, and two counts of kidnapping – the length of the delay was not substantial and does not weigh heavily in Huntsman's favor. See State v. Ciccone, 145 Idaho 330, ___, 297 P.3d 1147, 1156 (Ct. App. 2012) (review denied) (delay of nearly 12 months from filing of information to trial was "not as significant, given that the nature of the charges Ciccone was facing – two counts of first degree murder – can be fairly characterized as complex.").

Moreover, the length of the delay is not dispositive. None of the four Barker factors is by itself "either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial." Barker, 407 U.S. at 533. Because, for the reasons set forth in more detail below, there were valid reasons for the delay, and because Huntsman was not unfairly prejudiced by the delay, the length of the delay should be excused.

2. The Discovery Of New Evidence Constituted A Valid Reason For The Delay

Implicit in the standards applicable to claims of constitutional speedy trial violations is the recognition that "pretrial delay is often both inevitable and wholly justifiable." Avila, 143 Idaho at 853, 153 P.3d at 1199 (citing Doggett v. United States, 505 U.S. 647, 656 (1992)); State v. Davis, 141 Idaho 828, 837, 118 P.3d 160, 169 (Ct. App. 2005) (same). For that reason, different weights are assigned to different reasons for the delay. Barker, 407 U.S. at 531. As explained by the Supreme Court:

> A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

Id. at 531 (footnote omitted).

The state agrees with Huntsman that, "[i]n our case, the reason for the delay is clear[;] the state wanted to test, evaluate, and admit the gun that they believed was the murder weapon." (Appellant's brief, p.34.) Although Huntsman

urges this Court to equate the state's desire to actually present its case on the merits with an attempt to delay the trial in order to gain an unfair tactical advantage over him (see Appellant's brief, pp.34-39), there is no basis in law or fact to do so. Absent a showing of bad faith, it is perfectly proper for the state to dismiss and re-file charges for the purpose of continuing the trial to present witnesses and evidence that might not have otherwise been available to it in the first prosecution. See State v. Averett, 142 Idaho 879, 885, 135 P.3d 350, 356 (Ct. App. 2006) (newly discovered evidence seized from defendant's home "constitute[d] a sufficient basis to dismiss and re-file charges"); Davis, 141 Idaho at 843, 118 P.3d at 175 (state did not act with improper motive to delay in order to gain a tactical advantage when it dismissed and re-filed charges to accommodate witnesses' vacation schedules). Here, there simply is no indication that the state acted in bad faith. In fact, in requesting a continuance of the original case, the state was not only concerned with its own ability to evaluate and test the newly discovered murder weapon, it also specifically recognized the defense's interest in evaluating the weapon, as well. (Tr., Vol. I, p.79, L.23 – p.80, L.3.) Thus, far from demonstrating a desire by the state to somehow gain a tactical advantage over Huntsman, the record actually shows that the state sought the delay in the interest of fairness to all of the parties involved.

In an apparent attempt to demonstrate bad faith, Huntsman argues the state dismissed and re-filed the charges against him in a deliberate attempt to "defeat" his statutory speedy trial rights. (Appellant's brief, p.34.) Huntsman is incorrect. Faced with the denial of its motion for a continuance in case number

H0500555, the state had two options available to it: 1) proceed to trial against Huntsman without the murder weapon – evidence that was clearly important, relevant, and otherwise admissible in light of the fact that Huntsman was charged with murder, or 2) dismiss the case and thereby provide Huntsman the remedy to which he was entitled by statute for the failure to bring him to trial within six months. See I.C. § 19-3501 (remedy for failure to bring defendant to trial within six months is dismissal). The state chose the latter option and, in so doing, actually *honored* Huntsman's statutory speedy trial rights. That the state subsequently re-filed identical charges against Huntsman in case number H0501438 does not even suggest the state acted in bad faith. Idaho Code § 19-3506 specifically provides that a dismissal granted under I.C. § 19-3501 is not a bar to any other prosecution for the same offense if the offense is a felony.

Nor has Huntsman shown from the record that the state deliberately "delayed the trial in order to hinder the defense by getting around the discovery deadline" in case number H0500555 (Appellant's brief, p.34.) While it is true that the trial court had entered an order excluding certain fingerprint and ballistic evidence because the state missed the discovery deadline in case number H0500555 (see #33213/33243 R., Vol. III, p.459), there is no evidence in the record to suggest that the state deliberately sought to delay the trial for the purpose of circumventing the court's order. Rather, as Huntsman points out, until the discovery of the murder weapon two weeks before trial, the state was prepared to go to trial, even without the excluded evidence. (Appellant's brief, p.35.) And, as discussed in more detail in section II.C.4, *infra*, there is no

evidence Huntsman's defense was actually hampered by the introduction of the evidence at trial.

Ultimately, Huntsman's claims both below and on appeal boil down to his assertion that "the reason for the delay was so the state could produce more and better evidence against" him. (Appellant's brief, pp.34-39). Even assuming the truth of this assertion, Huntsman has failed to cite any authority for the proposition the desire of the state to present a strong case, based on all of the admissible evidence available to it, was an invalid reason for the delay in bringing him to trial. While Huntsman undoubtedly would have preferred for the state to have proceeded to trial as quickly as possible and without the murder weapon, the district court correctly concluded that the "desire of the State to further investigate this evidence, rather than simply ignore it, [was] reasonable." (R., p.599.)

3. Huntsman Timely Asserted His Speedy Trial Rights

The third factor in the Barker analysis is whether and how the defendant asserted his right to a speedy trial. A defendant's assertion of his right is "entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." Barker, 407 U.S. at 531-32; Davis, 141 Idaho 839, 118 P.3d at 171. "[F]ailure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." Id.

Huntsman asserted his speedy trial rights at the September 30, 2005 hearing on the state's motion to continue his trial in case number H0500555 and again in the motion to dismiss filed in case number H0501438. (R., pp.598-99.)

Because the issue in this case is whether trial counsel was ineffective for not pursuing the motion to dismiss based on an alleged speedy trial violation, the state will assume that, had the motion been pursued, the third Barker factor would weigh in Huntsman's favor.

4. Huntsman Was Not Unfairly Prejudiced By The Delay

The final and most important factor in the Barker analysis is the nature and extent of any prejudice suffered by the defendant as a result of the delay. Barker, 407 U.S. at 532; Lopez, 144 Idaho at 354, 160 P.3d at 1289; Davis, 141 Idaho at 840, 118 P.3d at 172. As explained by the Idaho Supreme Court:

> Prejudice is to be assessed in light of the interests of defendants which the right to a speedy trial is designed to protect. Those interests are (1) to prevent oppressive pretrial incarceration; (2) to minimize anxiety and concern of the accused, and (3) to limit the possibility that the defense will be impaired.

Young, 136 Idaho at 118, 29 P.3d at 954 (citing Barker, 407 U.S. at 532). Accord Lopez, 144 Idaho at 354-55, 160 P.3d at 1289-90; Avila, 143 Idaho at 854, 153 P.3d at 1200; Davis, 141 Idaho at 840, 118 P.3d at 172. "The third of these is the most significant because a hindrance to adequate preparation of the defense 'skews the fairness of the entire system.'" Lopez, 144 Idaho at 355, 160 P.3d at 1290 (citing Barker, 407 U.S. at 532; State v. Hernandez, 133 Idaho 576, 583, 990 P.2d 742, 749 (Ct. App. 1999)).

There is no question that Huntsman was continuously incarcerated in jail for just over 12 months while awaiting trial, and during that time he undoubtedly felt the anxiety and concern that any incarcerated individual would suffer. Despite Huntsman's argument to the contrary, however, there simply is no

evidence in the record to support his claim that his defense was actually impaired by the delay.

Huntsman claims to have been prejudiced because, after the state dismissed and re-filed the charges against him, the court reset the discovery deadlines and, as a result, the state was allowed to present witnesses and evidence in the second prosecution that it would not have been permitted to in the first. (Appellant's brief, pp.40-41.). Specifically, in addition to introducing the murder weapon and testimony relating to analyses of it, the state was also permitted to introduce fingerprint and ballistic evidence that the court had ordered excluded in the first prosecution because the state had missed the discovery deadline. (See #33213/33243 R., p.459.) The state was also able to present at trial the testimony of a witness, Steve Davis, whom it did not discover until after the charges were re-filed. (Tr., Vol. II, pp.2361-2364, pp.2380-2395, p.2668, L.20 – p.2669, L.7.) Again, it is important to note there is no evidence to the record to suggest that the state dismissed and re-field the charges for the purpose of circumventing the court's discovery order or for any other bad faith purpose. More importantly, however, Huntsman has failed to demonstrate from the record that he was actually prejudiced in any legally cognizable sense by the introduction of the evidence at trial.

The district court excluded the ballistic and fingerprint evidence in the first prosecution because the late disclosure of that evidence deprived Huntsman of a meaningful opportunity to evaluate the evidence and prepare to meet it at trial. (*See*, *generally*, Tr. Vol. I, p.412 (trial court explaining, in subsequent

prosecution, that the underlying purpose of the discovery deadlines contained in the court's order governing proceedings "was to force meaningful preparation" for trial).) Huntsman did not suffer similar prejudice in the second prosecution, however, because he had a meaningful opportunity to prepare to meet the evidence at trial. Although Huntsman understandably would have preferred for the state not to have presented evidence that tended to show his guilt, he has failed to show from the record that the introduction of such evidence actually implicated his right to a fair trial or impaired his ability to present a defense. *See* Davis, 141 Idaho 842-43, 118 P.3d at 174-75. To the contrary, the record shows that Huntsman's counsel was prepared to meet all of the fingerprint and ballistic evidence, as he thoroughly cross-examined the witnesses who testified about those subjects, including Steve Davis, and even presented his own expert to rebut the testimony of the state's expert regarding the murder weapon. (Tr., Vol. II, pp.2396-2419, pp.2586-2598, pp.2694-2729.) The district court thus correctly concluded that Huntsman was not prejudiced by the delay.

5. A Balancing Of The *Barker* Factors Weighs Against A Finding Of A Speedy Trial Violation

The four Barker factors, together with any other relevant circumstances, must be balanced and weighed to determine whether an individual's right to a speedy trial was violated. Barker, 407 U.S. at 533. In this case, although the length of the delay was sufficient to trigger a constitutional analysis, the remaining factors, on balance, weigh against a finding of a speedy trial violation. The state sought the delay for a valid reason and, although Huntsman asserted

his speedy trial rights, he cannot demonstrate from the record that he was unfairly prejudiced by the delay. In short, there is no reasonable probability that the motion to dismiss based on an alleged speedy trial violation would have succeeded on the merits had counsel pursued it. The district court thus correctly dismissed Huntsman's claim that trial counsel was ineffective for not pursuing the issue and preserving it for appeal.

CONCLUSION

The state respectfully requests that this Court affirm the judgment entered upon the court's orders summarily dismissing Huntsman's amended petition for post-conviction relief.

DATED this 18th day of October 2013.

LORI A. FLEMING
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 18th day of October 2013, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

GREG S. SILVEY
ATTORNEY AT LAW
P.O. BOX 565
STAR, ID 83669

LORI A. FLEMING
Deputy Attorney General

LAF/pm